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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SOFIA VERGARA, Plaintiff and Respondent, v. NICHOLAS LOEB, Defendant and Appellant.	B286252 (Los Angeles County Super. Ct. No. BC650580)

APPEAL from an order of the Superior Court of the County of Los Angeles, Raphael A. Ongkeko, Judge. Reversed with directions.

Theodora Oringher, Jennifer McGrath for Defendant and Appellant.

Fred Silberberg, Tin Le; Jeffer Mangels Butler & Mitchell and Susan Allison for Plaintiff and Respondent.

I. INTRODUCTION

Plaintiff Sofia Vergara sued her former fiancé, defendant Nicholas Loeb, for breach of contract and malicious prosecution based on his failed attempts to gain custody and control of two cryopreserved[1] pre-embryos the parties created while they were engaged. In response, Loeb filed a special motion to strike under Code of Civil Procedure section 425.16 (section 425.16), the so-called anti-SLAPP statute.[2] The trial court found that Vergara's claims were based on Loeb's protected activity, but denied the motion because it concluded she had shown a probability of success on the merits of her claims.

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[1] The term "cryopreserve" refers to the storage of tissue at extremely low temperatures. (See *Estate of Kievernagel* (2008) 166 Cal.App.4th 1024, 1026 ["fertility center operated a sperm cryopreservation storage program under which sperm was collected and stored at temperatures as low as -196 degrees centigrade. The frozen sperm could then be thawed and used for insemination"].)

[2] "A special motion to strike under section 425.16—the so-called anti-SLAPP statute—allows a defendant to seek early dismissal of a lawsuit that qualifies as a SLAPP. 'SLAPP is an acronym for "strategic lawsuit against public participation."' (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035.)

On appeal from that ruling, Loeb contends that he satisfied his burden under section 425.16 of showing that Vergara's claims against him arose from protected petitioning activity. He further contends that the trial court erred when it found Vergara made the required prima facie showing in support of each of her claims. Finally, Loeb claims that the trial court abused its discretion when it sustained Vergara's objections to his reply declaration and when it overruled certain of his objections to Vergara's opposition evidence.

We assume for the purposes of this appeal that each of the contract-based claims in Vergara's complaint arose from protected petitioning activity, and the parties agree that her claim for malicious prosecution arose from protected petitioning activity, thereby shifting the burden to Vergara to show a probability of success on the merits of each claim. We conclude the trial court correctly ruled that Vergara met her burden to show a probability of success on each claim based in a theory of breach of contract. However, Vergara failed to make the required showing of a probability of success on the malicious prosecution claim. Therefore, we reverse the trial court's order, with directions to enter a new order granting the motion with respect to the malicious prosecution cause of action only.

II. BACKGROUND

A. *The Parties' Relationship and the Form Directive*

While the parties were engaged to be married, they underwent in vitro fertilization (IVF) treatments at a fertility clinic in California (the clinic)[3] which resulted in the creation of two pre-embryos (the pre-embryos) that were then cryopreserved at the clinic. Prior to the treatments, the parties executed an agreement entitled "Directive for Partners Regarding Storage and Disposition of Cryopreserved Material Which May Include Embryos" (the form directive). The form directive provided, in pertinent part, that "[t]he purpose of this document is to declare our intentions and desires with respect to the storage, use and disposition of our cryopreserved material which may include embryos which are created by and stored at the [clinic]. [¶] . . . [¶] [A]ny and all changes to [this form directive] must be mutually agreed to between both partners. *One person cannot use the* [*c*]*ryopreserved* [*m*]*aterial to create a child* (whether or not he or she intends to rear the child) *without explicit written consent of the other person* (either by notary or witnessed by [a clinic p]hysician staff member or [its]

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[3] The clinic, which Vergara named as a defendant in her complaint, is ART Reproductive Center, Inc. The clinic was not involved in the proceedings on the special motion to strike and is not a party to this appeal.

staff). All changes must be in writing and signed by both parties. Unilateral changes cannot be honored by the [clinic]." (Italics added.) Before the pre-embryos were implanted successfully into a surrogate, the parties ended their relationship. Vergara has never provided consent to Loeb for use of the pre-embryos.

B. *Loeb Initiates the Santa Monica Action*

On August 29, 2014, Loeb filed an action against Vergara and the clinic in the Superior Court of Los Angeles County, seeking to establish and enforce his right to use the pre-embryos for implantation into a surrogate (the Santa Monica action). Loeb asserted five causes of action for declaratory relief, one for breach of oral contract, and one for promissory estoppel. In support of those claims, he alleged, among other things, that: the form directive signed by the parties prior to the fertility treatments did not invalidate the parties' preexisting oral agreement that the pre-embryos would be immediately implanted into a surrogate; the form directive was not an agreement with Vergara, but instead a consent form intended to benefit and protect the clinic; and the form directive was unenforceable because there was no consideration, it was uncertain, and he signed it under duress. In his prayer for relief, Loeb sought declarations that: (1) he had a right to possession and custody of the pre-embryos to use them to create children; (2) Vergara was estopped from preventing him from implanting the pre-

embryos into a surrogate; (3) the clinic's form directive executed by the parties was void and unenforceable; (4) the form directive was unconscionable; (5) the form directive was subject to rescission because Loeb signed it under duress; and (6) Vergara was an egg donor under the Family Code with no parental or financial obligations to any resulting children.

On December 6, 2016, on the eve of a hearing on Vergara's motion for sanctions based on discovery violations and for summary judgment/adjudication, Loeb voluntarily dismissed the Santa Monica action against Vergara without prejudice. On August 11, 2017, the trial court entered judgment after dismissal in favor of Vergara that included a cost award.

C. *Loeb Creates a Trust for the Benefit of the Pre-embryos and Initiates the Louisiana Action*

On November 30, 2016, Loeb as settlor created the Nick Loeb Louisiana Trust No. 1 (the trust) for the future benefit of the two principal beneficiaries of the trust, his "two daughters, Isabella Loeb and Emma Loeb, who [were] presently in a cryopreserved embryonic state" at the clinic. Loeb designated a third party as trustee and funded the trust with an initial conveyance of $28,000 which, after Loeb's death, was to be used by the trustee, in his discretion, for the "health, education, maintenance, or support" of the principal beneficiaries.

On December 7, 2016, Loeb directed the filing of a lawsuit naming the pre-embryos, the trust, and the trustee as plaintiffs against Vergara in state court in Louisiana (the Louisiana action). Loeb is not personally a party to the Louisiana action. Vergara removed the Louisiana action to the United States District Court for the Eastern District of Louisiana. As noted by the federal district court, "Louisiana has the most favorable state laws regarding the rights pertaining to IVF created embryos, which make them juridical people that have the right to sue and be sued and cannot be intentionally destroyed. [Citation.] The plaintiffs in this suit are the pre-embryos [and the trust]." In the Louisiana action, the pre-embryos and the trust sought relief similar to what Loeb had sought on his own behalf in the Santa Monica action, including granting Loeb control over the pre-embryos and termination of Vergara's parental rights, as well as additional relief, including a finding that Vergara had tortiously interfered with the pre-embryos' ability to inherit from the trust by preventing transfer to a surrogate. On August 8, 2017, the court in the Louisiana action granted Vergara's motion to dismiss the Louisiana action for lack of personal jurisdiction over her.

D. *Vergara Files the Instant Action*

On February 14, 2017, prior to the entry of judgment in the Santa Monica action and the dismissal of the Louisiana action, Vergara filed the instant action against Loeb

asserting causes of action for declaratory relief, permanent injunctive relief, breach of contract, promissory fraud,[4] promissory estoppel, and malicious prosecution.[5] As discussed in detail below, Vergara alleged, among other things, that Loeb breached the parties' agreement in the form directive not to use the pre-embryos without her written consent by filing and litigating for two years the Santa Monica action and creating the trust to pursue the Louisiana action, which actions caused her to suffer damages in the form of two years of litigation costs. In addition to damages, Vergara alleged that Loeb's actions in litigating the Santa Monica action and creating the trust to pursue the Louisiana action entitled her to declaratory and injunctive relief to prevent Loeb from engaging in any future attempt to use the pre-embryos without her written consent. Vergara further alleged that Loeb's filing and litigation of

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[4] The promissory fraud claim was not subject to the special motion to strike and is not an issue on appeal because the trial court previously sustained a demurrer to that claim, and Vergara did not amend it. Vergara also named the clinic as a defendant in her cause of action for declaratory relief. The clinic is not a party to this appeal.

[5] Except for the malicious prosecution cause of action, all of Vergara's remaining causes of action are based on claims that Loeb has breached, and continues to try to breach the form directive. We refer to these remaining causes of action as contract-based claims.

the Santa Monica action supported a claim for malicious prosecution entitling her to damages.

E. *Loeb's Motion to Strike*

On April 14, 2017, Loeb filed his special motion to strike. He argued that each of Vergara's claims was based on his conduct of filing and prosecuting the Santa Monica action and creating the trust to pursue the Louisiana action, conduct that he characterized as protected activity under section 425.16. In addition, Loeb argued that Vergara could not prevail on the merits of any of her claims because, among other things, her contract-based claims were barred by the litigation privilege in Civil Code section 47, subdivision (b) (section 47(b)). He also maintained that Vergara could not prevail on the merits of her malicious prosecution claim because she could not show that the Santa Monica action was filed without probable cause or that he acted with malice. Loeb supported his motion with a request for judicial notice that attached a copy of the third amended complaint and a protective order filed in the Santa Monica action. Loeb did not, however, submit any declaration testimony or other documentary exhibits in support of the motion.

Vergara opposed the motion and supported her opposition with her own declaration with an exhibit, attorney declarations with exhibits, and a request for

judicial notice attaching five documents filed in the Santa Monica action.

Loeb replied to the opposition and submitted his own declaration attaching excerpts of his deposition testimony in the Santa Monica action. Loeb also submitted objections to the opposition declarations by Vergara.

In response to the reply, Vergara submitted objections to Loeb's declaration, a response to Loeb's objections to her opposition declarations, and a supplemental request for judicial notice attaching a dismissal order issued by the federal district court in the Louisiana action.

F. *The Trial Court's Ruling*

At the hearing on the special motion to strike, the trial court heard the arguments of counsel and denied Loeb's motion. That same day, the trial court issued a minute order. The court sustained Vergara's objections to Loeb's declaration. It continued, "Motion to Strike Pursuant to CCP 425.16 [¶] The Court finds that [Loeb] has met his initial burden to establish the first prong, i.e., that each cause of action in the complaint arises from his constitutionally protected activity, pursuant to one or more of the four enumerated categories in CCP 425.16(e). [¶] As far as the second prong, [Vergara] has shown that she has a reasonable probability of success on the merits as to each cause of action and, therefore, has met her burden on the second prong. [¶] Defendant Loeb's motion to strike

pursuant to CCP 425.16 is DENIED." Loeb filed a timely notice of appeal from the order denying his special motion to strike.

III. DISCUSSION

A. *Anti-SLAPP Principles*

Section 425.16,[6] "California's so-called anti-SLAPP (strategic lawsuit against public participation) statute, is intended to resolve quickly and relatively inexpensively

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[6] Code of Civil Procedure section 425.16 provides, in pertinent part, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, § 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (*Id.*, § 425.16, subd. (e).)

meritless lawsuits that threaten free speech on matters of public interest." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639.) "A court's consideration of an anti-SLAPP motion involves a two-pronged analysis. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) Recently, the Supreme Court has expounded on the standards to be applied in this analysis: 'At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. . . . If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken.'" (*Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602, 614 (*Medical Marijuana*).)

B. *Standard of Review*

An order denying or granting a special motion to strike under section 425.16 is directly appealable. (§ 425.16, subd. (i), Code Civ. Proc. § 904.1, subd. (a)(13).) We review the trial court's order de novo. (*Flatley v. Mauro* (2006) 39

Cal.4th 299, 325.) We do not weigh the evidence; rather, we accept as true evidence favorable to plaintiff, and evaluate evidence favorable to defendant to determine whether it defeats plaintiff's claim as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

C. *First Prong: Protected Activity*

"To make a showing under the first prong, the defendant need not show that the actions it is alleged to have taken were protected as a matter of law, but need only establish a prima facie case that its alleged actions fell into one of the categories listed in section 425.16, subdivision (e). (See *Flatley v. Mauro,* [*supra*,] 39 Cal.4th [at p. 314].) . . . [T]he 'anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier I*).)" (*Medical Marijuana, supra*, 6 Cal.App.5th at pp. 614–615.) "Filing a lawsuit is an exercise of one's constitutional right of petition, and statements made in connection with or in preparation of litigation are subject to section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.)

1. Contract claims

With the exception of Loeb's malicious prosecution claim, all of Vergara's claims are based on Loeb's alleged violations of the form directive, and particularly the clause relating to use of the pre-embryos. We assume, without deciding, that these claims are based on Loeb's protected activity.

2. Malicious prosecution claim

Vergara concedes that the malicious prosecution claim arises from protected activity, namely Loeb's filing of the Santa Monica action. We agree. "By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1130–1131.) Accordingly, every Court of Appeal that has addressed the question has concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute. (See, e.g., *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220–221; *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087–1088.)" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

D. *Prong 2: Probability of Prevailing*

Assuming Loeb met his burden on prong one with respect to Vergara's contract-based claims, and after finding Loeb met his burden on prong one with respect to the malicious prosecution claim, the burden shifted to Vergara to demonstrate that she had a probability of prevailing on her claims. "To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([Code Civ. Proc.,] § 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff . . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 738 ['the anti-SLAPP statute requires only "a minimum level of legal sufficiency and triability" [citation]'], quoting *Linder v.*

Thrifty Oil Co. (2000) 23 Cal.4th 429, 438, fn. 5.)" (*Soukup, supra,* 39 Cal.4th at p. 291.)

1. Vergara's complaint and the parties' evidence

We now turn to Vergara's complaint and the evidence relating to her claims. The general allegations and facts section of the complaint recites the following activities by Loeb that presumably form the basis of her claims. "On August 29, 2014, Defendant Loeb filed [the Santa Monica] action against [Vergara] and [the clinic] attempting to obtain full custody of the [p]re-[e]mbryos and bring them to term, in breach of the [form directive] . . . . Upon information and belief, Defendant Loeb has set up a trust in the State of Louisiana . . . . Defendant Loeb's establishment of this trust is yet another act by him which is directly contrary to the terms of the [form directive] . . . . [¶] [A] complaint related to Defendant Loeb's trust was filed in Louisiana on December 7, 2016. [¶] . . . [T]he establishment of the trust . . . constitutes nothing more than a blatant attempt by Defendant Loeb to circumvent and effectively breach the [form directive] . . . . These actions . . . constitute a violation of the [form directive]. [¶] . . . [¶] Due to Defendant Loeb's breach of [the form directive] by going back on those promises he made to [Vergara], [Vergara] *has incurred damages* . . . ."

In her declaration in opposition to Loeb's motion to strike, Vergara explained the IVF treatments the parties

underwent, which gave rise to these related litigations. She described how she and Loeb reviewed and signed various consents and agreements, including "the [form directive], which we both discussed, reviewed, and signed before a witness at the [clinic]. . . . [¶] The second round of IVF treatments in November 2013 resulted in [the two pre-embryos]."

Vergara then described the termination of her relationship with Loeb, his request to use the pre-embryos for implantation in a surrogate, and her reasons for refusing to consent to such use. "The relationship ended on very hostile terms . . . . [¶] [Loeb] asked me after the break-up if he could have sole custody of the [p]re-[e]mbryos, which led me to believe that he clearly understood (as I did) that he had no right to act unilaterally to use the [p]re-[e]mbryos or bring them to term without my consent. However, I did not want [Loeb] to be able to bring them to term without my involvement, so I refused, as I believe I am entitled to do under the [form directive]. I never agreed that I would let [Loeb] bring the [p]re-[e]mbryos to term to be raised without me."

Finally, Vergara provided her understanding of why Loeb filed the Santa Monica litigation and created the trust, as well as her understanding of why those actions breached the parties' agreement in the form directive not to use the pre-embryos without written consent. "Based on my refusal to turn over the [p]re-[e]mbryos to him after our break-up, [Loeb] knew when he filed the [Santa Monica action] that he

needed my consent under the [form directive], that he did not have my consent, and that there was no other agreement between us that would allow him unilateral custody. He filed that lawsuit anyway, I believe, to try and embarrass and harass me publicly about this very private and sensitive issue. [¶] I have been provided with a copy of the [trust], which is a . . . document I now understand [] Loeb set up without ever consulting me. I was devastated to see that the [t]rust refers to the [p]re-[e]mbryos as [Loeb's] 'children,' since this is a clear indication that he believes he has the right to use the [p]re-[e]mbryos unilaterally, and to bring them to term and provide for them as his 'children' without my consent. [¶] I have never consented to [Loeb] establishing any [t]rust on behalf of either of the [p]re-[e]mbryos, just as I have never consented to any other request by [Loeb] to take control of the [p]re-[e]mbryos and bring either of them to term. I believe his actions in setting up the [t]rust clearly violate the terms of the [form directive] . . . . I never would have agreed to the IVF treatments with [Loeb], and I never would have signed the [form directive] allowing the IVF treatments to go forward, had I known at the time that [Loeb] did not intend to keep the promises he made in the [form directive] . . . ."

Vergara's attorney, Fred Silberberg, also filed a declaration in opposition to the motion to strike, explaining that he had taken Loeb's deposition in the Santa Monica action. Silberberg attached five pages of Loeb's deposition transcript in which Loeb testified that he had previously

impregnated two different women, each of whom chose to terminate her pregnancy through abortion. Silberberg also attached excerpts from Loeb's deposition transcript in which Loeb admitted that no one at the clinic, including the supervising physician, forced him to sign the form directive and in which he admitted that Vergara did not physically force him to sign the form directive, but asserted he felt forced to sign it because of her verbal and emotional abuse.[7]

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[7] Loeb contends the trial court erred in overruling several objections to the declarations of Vergara and Silberberg filed in opposition to Loeb's motion to strike. In reaching our decision, it is not necessary to credit or rely on any of the allegedly objectionable testimony, so we do not resolve the evidentiary disputes. Specifically, Loeb objects to, and we do not rely on, the declaration testimony to the extent it purports to establish: Loeb's subjective understanding of the meaning and enforceability of the form directive; Loeb's motivation and reasons for filing the Santa Monica action, or establishing the trust; Vergara's subjective opinion of the meaning of the form directive, and her conclusion that Loeb breached the form directive; and Silberberg's testimony relating to Loeb's stated pro-life beliefs. We express no opinion on the admissibility or inadmissibility of such testimony.

Loeb also filed a declaration in support of his reply. The trial court sustained Vergara's objections to Loeb's declaration, and Loeb challenges that ruling on appeal in connection with his argument that Vergara's case is based on Loeb's protected conduct. Because we proceed with the understanding that Loeb has met the first prong under

2. Contract claims

Loeb's principal contention is that Vergara did not show a reasonable probability of success on her contract-based claims because they are barred, as a matter of law, under the litigation privilege in Civil Code section 47(b). "The privilege in [Civil Code] section 47[, subdivision (b)] is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing. (See, e.g., *Kashian v. Harriman*, [*supra*, 98 Cal.App.4th at pp. 926–927] [where the plaintiff's defamation action was barred by [section 47(b)], the plaintiff cannot demonstrate a probability of prevailing under the anti-SLAPP statute]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783–785 [the defendant's prelitigation communication privileged and trial court therefore did not err in granting motion to strike under the anti-SLAPP statute].)' (*Flatley* [*v. Mauro*], *supra*, 39 Cal.4th at p. 323.)" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 38.) Vergara argues, and we agree, that the litigation privilege does not bar her contract-based claims.

"[T]he [litigation] privilege is generally described as one that precludes liability in tort, not liability for breach of contract." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763,

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section 425.16, we need not resolve this evidentiary issue on appeal.

773.) Therefore, "whether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege." (*Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1492 (*Wentland*).) "In summary, the purpose of the litigation privilege is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation." (*Ibid.*) None of these policies are furthered by application of the privilege here.

In describing the conduct at issue, Loeb invites us to focus our attention on his own rights to access the courts and to obtain a judicial resolution of disputes about the meaning, scope, interpretation, or enforceability of the form directive. But Loeb engaged in conduct well beyond accessing the courts on his own behalf—without Vergara's consent, he unilaterally caused the pre-embryos to file litigation as plaintiffs (and juridical people) in court in Louisiana, and he unilaterally chose for the pre-embryos the positions they would take, including: seeking to give Loeb control over them; preventing Vergara from invoking the form directive in deciding how the pre-embryos would be used; seeking a finding that Vergara tortiously interfered with the pre-embryos' rights to be transferred to a surrogate; and terminating Vergara's parental rights.

In light of the above conduct, allowing Vergara to proceed with her contract-based claims does not undermine "the principal purpose of the litigation privilege," which is

"to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort action." (*Wentland*, *supra*, 126 Cal.App.4th at p. 1492, quotations and citations omitted.) Vergara's claims, to the extent they are based on Loeb creating the trust and causing the pre-embryos to file suit on their own behalf, in no way undermine Loeb's own access to the courts to litigate his issues relating to the form directive. Indeed, Loeb's filing of the Santa Monica lawsuit proves such access; despite free access to the California courts to resolve his own claims relating to the meaning, scope, and enforceability of the form directive, he elected voluntarily to dismiss his suit.

Moreover, to the extent Loeb is contending that his access to the Louisiana courts needs to be protected by application of the litigation privilege here, we disagree. First, Loeb was not even a party to the Louisiana action: the pre-embryos and the trust filed suit. Second, access to the Louisiana courts is particularly insignificant, given that the federal court ruled Louisiana did not even have personal jurisdiction over Vergara. Third, while we do not definitively resolve the issue of breach in deciding whether Vergara has shown minimal merit,[8] the form directive is

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[8] Loeb argues for the first time on appeal that Vergara cannot show a probability of prevailing because her allegations do not make out a present breach of the form directive. However, Loeb waived this argument by not

reasonably susceptible to an interpretation prohibiting the unilateral use of the pre-embryos to create juridical persons and use them in an effort to avoid the form directive's requirement of written consent. Vergara has shown more than minimal merit to pursue contract-based claims "based on breach of a separate promise [i.e., the no use provision in the form directive] independent of the litigation." (*Wentland*, *supra*, 126 Cal.App.4th at p. 1494; see *Navellier I*, *supra*, 29 Cal.4th at p. 94 ["[A] defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches the contract."]; see also *Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 8 ["The litigation privilege was never meant to spin out from judicial action a party's performance and course of conduct under a contract."].) Invoking the litigation privilege to protect Loeb's conduct of unilaterally creating juridical persons from the pre-embryos, and unilaterally directing their legal claims, would arguably frustrate the purpose of the mutual agreement required by the form directive. (See *Wentland*, *supra,* at p. 1494.)

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raising it in the trial court. (*McKee v. Orange Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1320.) This case does not present a circumstance where this court should exercise its discretion to decide the issue of breach based upon the current record, before the parties fully develop the record, including extrinsic evidence, on the meaning of the relevant contract provisions.

Nor are any other policies of the litigation privilege furthered by its application here. Loeb does not, and could not, make any credible argument that the policies to promote truthful testimony and zealous advocacy are implicated in this case in any way. Application of the litigation privilege here also does not "encourage finality and avoid litigation." (*Wentland*, *supra*, 126 Cal.App.4th at p. 1494.) Indeed, application of the privilege does precisely the opposite, by preventing Vergara from obtaining a court ruling that would resolve and bring finality to the parties' continuing disagreement over the interpretation of the form directive.

Loeb also argues Vergara has not shown a probability of prevailing because she was required to bring her claims in response to Loeb's complaint in the original Santa Monica action, as related causes of action under Code of Civil Procedure section 426.30, subdivision (a). Vergara's claims based on Loeb's conduct in Louisiana as described above, however, did not exist at the time she answered in the Santa Monica action. As such, section 426.30, subdivision (a) is inapplicable. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 960 ["section 426.30 includes a timing element. The related cause of action must be one that was in existence at the time of service of the answer (§ 426.30, subd. (a)); otherwise, the failure to assert it in prior litigation is not a bar under the statute."].)

For these reasons, Vergara has met her burden to show more than minimal merit for her contract-based claims.

3. Malicious prosecution claim

Next, we consider whether Vergara could meet her burden on her malicious prosecution claim, which was based on Loeb's filing of the Santa Monica action (and not on Loeb's conduct in Louisiana). "[I]n order to establish a cause of action for malicious prosecution . . . a plaintiff must demonstrate 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in [her], plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations],' (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871–872 (*Sheldon Appel Co.*).) "[C]ourts have long recognized that the tort [of malicious prosecution] has the potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to . . . bring a civil dispute to court, and, as a consequence, the tort has traditionally been regarded as a disfavored cause of action. [Citations.]" (*Id.* at p. 872.) The litigation privilege does not bar such claims. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360.)

We will assume for purposes of this decision that Vergara sufficiently established Loeb initiated the Santa Monica action with malice and the action was legally terminated in her favor. We thus focus our analysis on whether Vergara could show that Loeb brought the Santa Monica action without probable cause.

"The question of probable cause is 'whether, as an objective matter, the prior action was legally tenable or not.' (*Sheldon Appel Co.*[, *supra*,] 47 Cal.3d at p. 868.) 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164–165.) 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 597.)" (*Soukup, supra,* 39 Cal.4th at p. 292.) "'Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed.'" (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1449; accord, *Jarrow Formulas, Inc. v. Lamarche, supra*, 31 Cal.4th at p. 742.)

We agree with Loeb that the reasoning set forth in *Szafranski v. Dunston* (Ill.App.Ct. 2015) 34 N.E.3d 1132 (*Szafranski*) provides a tenable legal basis for the claims asserted in the Santa Monica action.[9] In that case, after an unmarried couple created pre-embryos by IVF treatments, a dispute arose over custody of them. The appellate court

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[9] Although *Szafranski* was decided after defendant filed the Santa Monica action, the decision supports a conclusion that defendant's legal claim was an arguably tenable one.

awarded custody of the pre-embryos to the woman, despite the existence of a consent form similar to the form directive in this case,[10] holding that, "We do not believe that the [consent form] is ambiguous on the question of disposition [of the pre-embryos] in the event of the parties' separation—there is no set disposition. However, even assuming *arguendo* that the document is ambiguous, we find that the extrinsic evidence also supports our interpretation that the parties never intended to be bound to a particular disposition [of the pre-embryos] in signing [the consent form]." (*Id.* at p. 1157.)

Here, as in that case, the form directive did not expressly address the disposition of the pre-embryos in the event the parties separated, and Loeb therefore sought to prove by extrinsic evidence that, prior to the IVF treatments, the parties orally agreed that any viable pre-embryos resulting from those treatments would be implanted immediately in a surrogate.

Vergara contends, however, that the legal theory underlying the Santa Monica action was untenable based on the facts known to Loeb at the time he filed the action. She bases this assertion on three facts: (1) prior to filing suit, Loeb asked Vergara to consent to his use of the pre-embryos

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[10] The consent form provided, in pertinent part: "No use can be made of these [pre-embryos] without the consent of both partners . . . ." (*Szafranski, supra*, 34 N.E.3d at p. 1138.)

for implantation, thereby purportedly admitting that he had no independent legal entitlement to them; (2) Loeb admitted that two former girlfriends who became pregnant by him terminated their pregnancies by abortion, a fact that purportedly shows Loeb's "pro-life" rationale for filing the Santa Monica action to be a pretext; and (3) Loeb admitted in deposition that no one forced him to sign the consent form, a fact that purportedly shows he knew there was no tenable factual basis for his duress claim.

While the facts proffered by Vergara support her contention that Loeb acted with malice, they do not demonstrate that Loeb knew at the time he filed the Santa Monica action that his claims lacked merit. The fact that Loeb asked for Vergara's consent to use the pre-embryos prior to filing suit is not, by itself, sufficient to show Loeb's knowledge or awareness of the relative merits of his claims. Although Loeb's request for Vergara's consent may have been consistent with the consent clause in the form directive, it was not necessarily an admission that the clause was valid and enforceable. It could show that Loeb was aware the clinic would not release the pre-embryos to him without Vergara's consent. But no reasonable trier of fact could conclude that by merely making such a request, Loeb demonstrated knowledge that his claims were untenable.

Similarly, Loeb's admissions concerning his former girlfriends' abortions do not support a reasonable inference that Loeb knew his claims lacked merit when he filed them. Even if the admissions showed that Loeb's proffered reason

for filing the action was pretextual, his subjective state of mind at the time of the filing of the action is irrelevant to the probable cause analysis. (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 878 ["the 'probable cause' element in the malicious prosecution tort plays a role quite distinct from the separate 'malice' element of the tort. Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted"].) Thus, whether Loeb was truly motivated by a pro-life philosophy at the time he filed the action is a subjective matter that is insufficient to demonstrate that he lacked probable cause to file his action.

Finally, Loeb's deposition admissions that no one forced him to sign the form directive do not support a reasonable inference that his duress claim lacked merit. First, Loeb was careful to qualify his answers concerning whether Vergara forced him to sign the form directive, and expressly limited them to the issue of physical force. Moreover, he stated that Vergara verbally and emotionally coerced him into signing the form directive. Given that testimony, and absent some further admissions that Loeb

signed the form directive willingly and without any form of duress, Vergara failed to show that Loeb's duress claim lacked any credible factual basis. Vergara therefore could not meet her burden of establishing a probability of prevailing on her malicious prosecution claim.

V. DISPOSITION

The order denying the special motion to strike is reversed. The trial court is directed to enter a new and different order granting the motion as to the malicious prosecution cause of action, and denying the motion in all other respects. In the interests of justice, each party is to bear its own costs on appeal.

MOOR, Acting P.J.

I concur:

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Sofia Vergara v. Nicholas Loeb
B286252

KIM, J., Concurring, in part, and dissenting, in part.

I concur in the majority's disposition reversing the trial court's denial of Loeb's motion to strike Vergara's claim for malicious prosecution pursuant to Code of Civil Procedure section 425.16 (section 425.16). I dissent from the majority's conclusion that the trial court properly denied Loeb's motion to strike the breach of contract claims. I would reverse the trial court's denial of the motion and remand with directions to enter a new order granting the motion on the breach of contract claims.

It was unnecessary for the majority to determine whether Loeb could meet the first prong of the anti-SLAPP analysis, that is, establish a prima facie case that his alleged actions fell into one of the categories listed in section 425.16, subdivision (e). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314.) But in reversing the trial court's denial of the motion, I would necessarily consider whether Loeb satisfied the first prong.

Vergara maintains that Loeb failed to carry his burden on the protected activity prong because he did not submit any evidence in support of his motion. I disagree and conclude that because "the complaint itself alleges acts included within section 425.16, subdivision (e), there is no

reason to go beyond the scope of those allegations to determine whether a plaintiff's claims arise from protected conduct." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 937.) "To make a showing under the first prong, the defendant need not show that the actions it is alleged to have taken were protected as a matter of law, but need only establish a prima facie case that its alleged actions fell into one of the categories listed in section 425.16, subdivision (e). [Fn. omitted.] (See *Flatley v. Mauro*[*, supra,*] 39 Cal.4th [at p.] 314 . . . .)" (*Medical Marijuana, Inc. v. Project CBD.com* (2016) 6 Cal.App.5th 602, 614.) Here, the allegations in Vergara's complaint state that her entitlement to relief on each contract-based claim is based on Loeb's conduct in filing and pursuing the Santa Monica action and in creating the trust in order to pursue the Louisiana action. The complaint asserts "[i]t is clear that . . . Loeb has set up th[e] trust in the name of the [p]re-[e]mbryos and designated [the trustee] for the *sole purpose* of allowing this third party to bring suit against [Vergara] in the Louisiana courts. . . ." (Italics added.) These allegations are sufficient to meet the first prong. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 ["Filing a lawsuit is an exercise of one's constitutional right of petition, and statements made in connection with or in preparation of litigation are subject to section 425.16"].)

As to the second prong, in my view, Vergara's breach of contract claims are barred, as a matter of law, by the litigation privilege. The allegations in Vergara's complaint

belie her argument on appeal that her claims are "based on breach of a separate promise independent of the litigation." (*Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1494.) Where, as here, a plaintiff alleges that a defendant undertook an action for the "sole purpose" of filing litigation, the privilege should apply. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 ["'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation]'"].)

This case is not analogous to one in which a defendant "has validly contracted not to speak or petition . . . in effect 'waiv[ing]' the right to the anti-SLAPP statute's protection." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94.) I do not interpret Loeb's agreement not to unilaterally "use" the pre-embryos "to create a child" as an agreement not to challenge the enforceability of the consent provision itself, even if the litigation strategy employed by Loeb in pursuit of such challenge includes the creation of a Louisiana trust.

As the majority notes, Loeb was not a party to the Louisiana action but instead filed the action in the purported name of the pre-embryos and the trust. But an anti-SLAPP motion may be brought on behalf of another "person." (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 ["qualifying acts committed by attorneys in representing clients in litigation" protected by anti-SLAPP statute].) I am not persuaded that the unique designation of the plaintiffs in the

Louisiana action lessens the "principal purpose" of the litigation privilege, which is "'to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort action.' [Citation.]" (*Wentland v. Wass*, *supra*, 126 Cal.App.4th at p. 1492.) Application of the litigation privilege here would promote this principal purpose, by enabling a litigant the utmost freedom of access to the courts to test the meaning, scope, interpretation, and enforceability of the form directive.

KIM, J.